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No. 87-6431

In the Supreme Court of the United States

OCTOBER TERM, 1988

WAYNE T. SCHMUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to convict petitioner on the charges of using the mails for the purpose of executing a scheme to defraud retail purchasers of used cars by turning back odometer readings.

2. Whether the misdemeanor of odometer tampering, 15 U.S.C. 1984 and 1990c, is an "offense necessarily included" (Fed. R. Crim. P. 31(c)) in the offense of mail fraud, 18 U.S.C. 1341, even though not all the elements of odometer tampering are elements of mail fraud.

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OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 87-108) is reported at 840 F.2d 384. The opinion of the three-judge panel (J.A. 69-82) is reported at 776 F.2d 1368.

JURISDICTION

The judgment of the court of appeals (J.A. 109-110) was entered on January 21, 1988. The petition for a writ of certiorari was filed on February 16, 1988, and was granted on May 16, 1988 (J.A. 111). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on 12 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 90 days' imprisonment

on Count 1 and four years' probation on the remaining counts (J.A. 65-66). After a divided panel reversed petitioner's convictions (*id.* at 83-84), the court of appeals heard the case en banc and affirmed (*id.* at 110).

1. Petitioner was charged in the indictment with devising a scheme to defraud retail purchasers of used vehicles by turning back odometer readings (J.A. 3-4). The evidence at trial showed that, during 1978 and 1980, petitioner regularly purchased used cars and trucks at auctions in Illinois (Tr. 102). On about 150 occasions, petitioner had a person named "Fred" in Rockford, Illinois, turn back the odometer readings on the used vehicles (*id.* at 102-103). Petitioner then prepared odometer statements based on the new, false readings (*id.* at 103). Petitioner sold some of the vehicles with altered odometer readings to four retail auto dealers in Wisconsin. When they bought the used vehicles from petitioner and resold the vehicles to the public, the four dealers relied on petitioner's representations as to the accuracy of the vehicles' mileage readings (*id.* at 28-29, 34-35, 40-42, 50, 54-58, 68). The four dealers testified that a vehicle's mileage is an important factor in determining the price of a used car (*id.* at 25-26, 32, 52, 66).

The dealers resold the vehicles to Wisconsin customers (J.A. 88). When they made a sale, the dealers mailed a title application on behalf of the purchaser to the Wisconsin Department of Motor Vehicles (Tr. 27-28, 32-33, 59-60, 66-67). A purchaser could not obtain a license plate without a title (*id.* at 33, 59-60, 68-69). Thus, a motor vehicle could not be driven in Wisconsin until a proper title had been issued (*id.* at 4-5). At least two of the dealers told petitioner that they mailed title applications for their retail customers (*id.* at 37, 55, 64). The four dealers mailed the 12 title applications that were charged as the illegal

mailings in the indictment (*id.* at 7-11, 42-44, 59, 66-67, 96-97; GXs 1-12).

Nine retail purchasers—the victims of petitioner's scheme—testified at trial. They all stated that they relied on the false odometer readings when they made their buying decisions (Tr. 74, 77, 80, 82-83, 85, 87, 89, 91, 93, 95-96). The odometer readings on the nine vehicles purchased by those persons had been turned back between 18,000 and 49,000 miles (*id.* at 41, 74-75, 77-78, 80-84, 85, 87, 89, 91-92, 95-96; GXs 1, 3, 5-11; see also Tr. 37-42; GXs 2C, 2D, 4B, 12B).

Petitioner's scheme was discovered after several used car buyers, who suspected that their odometers had been altered, complained to state authorities (Tr. 123). An investigator for the Wisconsin Department of Transportation then checked the histories of the suspect vehicles, which led him to petitioner's business (*id.* at 124). An FBI agent interviewed petitioner, who admitted that he had sold the 12 cars involved in this case and that he had caused the odometer readings on the cars to be turned back (*id.* at 105-106; GXs 1E, 2F, 3D, 4C, 5D, 6C, 7C, 8C, 9B, 10F, 11B, 12C).

2. Prior to trial, petitioner moved to dismiss his indictment on the ground that the mail fraud statute, 18 U.S.C. 1341, did not cover his conduct because the mailings of the title applications did not further the fraudulent scheme. The district court denied that motion. The court held that whether the mailings set forth in the indictment furthered the scheme was a question for the jury. J.A. 11-12.

Petitioner also moved the district court under Fed. R. Crim. P. 31(c) to instruct the jury that it could find petitioner guilty of the misdemeanor of odometer tampering (15 U.S.C. 1984 and 1990c) rather than the felony of mail

fraud (J.A. 14).[1] The trial court denied that motion because, in the court's view, odometer tampering is not a necessarily included offense of mail fraud (*id.* at 28).

At trial, petitioner's lawyer conceded that petitioner had devised and executed a scheme to defraud (Tr. 166, 171, 174). Petitioner's counsel asserted (*id.* at 166-167), however, that the mailings of the title applications did not further petitioner's scheme and thus were not made "for the purpose of executing such scheme" (18 U.S.C. 1341). Petitioner's counsel argued that the title documents assisted the investigation of odometer fraud, because several of the title applications listed the vehicles' odometer readings (Tr. 172-173, 176-177).[2]

The trial court instructed the jury that in order to find petitioner guilty of mail fraud the jury had to find beyond a reasonable doubt that petitioner knowingly devised a scheme to defraud, and that he caused some matter to be sent in the mail for the purpose of executing that scheme (Tr. 189-190). The court also instructed the jury that it need not find that the material sent through the mail was itself false or fraudulent, or that petitioner intended to use the mails to accomplish the fraud (*id.* at 190). The court told the jury that petitioner could be found guilty if the use of the mails was reasonably foreseeable (*id.* at 190-191). The jury returned guilty verdicts on all 12 charges of mail fraud (J.A. 65).

3. A divided panel of the court of appeals reversed and remanded the case for a new trial (J.A. 69-82). Relying on *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981),

[1] In 1986, Congress made odometer tampering a felony. See Truth in Mileage Act of 1986, Pub. L. No. 99-579, § 3(b), 100 Stat. 3311.

[2] An official from the Wisconsin Department of Motor Vehicles testified, however, that the title documents did not contain enough information to reveal that the odometers had been tampered with (Tr. 21-24).

cert. denied, 456 U.S. 1006 (1982), the panel rejected petitioner's claim that he was entitled to a judgment of acquittal because the mailings were not made for the purpose of executing his scheme (J.A. 70-71). But the panel agreed with petitioner that the district court violated Fed. R. Crim. P. 31(c) by failing to instruct the jury that it could find petitioner guilty of odometer tampering rather than mail fraud (J.A. 71-78). The panel applied the "inherent relationship" test to determine whether an offense is "necessarily included" in another offense within the meaning of Rule 31(c) (J.A. 72-73). Under that test, one offense is necessarily included within another when (1) the facts as alleged in the indictment and proved at trial support the inference that the defendant committed the less serious offense, and (2) there is an inherent relationship between the two crimes (*id.* at 73-74). The panel explained that an "inherent relationship" exists when the two offenses "relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense" (*id.* at 73).

Under the inherent relationship test, the panel held that odometer tampering is a necessarily included offense of mail fraud; thus, the district court should have instructed the jury that it could have found petitioner guilty of odometer tampering instead of mail fraud (J.A. 73-74). The panel noted that the fraudulent scheme proved at trial was premised on petitioner's tampering with odometers, and it concluded that there is an inherent relationship between the two offenses—mail fraud and odometer tampering—because "[b]oth offenses protect against the same kind of societal wrong: fraud" (*id.* at 74).[3]

[3] Judge Fairchild dissented on the ground that mail fraud and odometer tampering are not inherently related offenses (J.A. 78-82).

4. The en banc court of appeals vacated the panel decision and affirmed petitioner's convictions (J.A. 85-108). The court held that under Fed. R. Crim. P. 31(c), one offense is necessarily included within another "only when the elements of the lesser offense form a subset of the elements of the charged offense" (J.A. 94 (footnote omitted)). The court concluded that this traditional "elements" test "is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of 'necessarily included' under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy" (J.A. 94-95).[4]

Applying the elements test, the en banc court ruled that mail fraud requires proof that a defendant devised a scheme to defraud and that the mails were used in furtherance of the scheme, but that it is not necessary to show that the scheme was successfully carried out (J.A. 90). The court further observed (*id.* at 91) that the indictment in this case charged that petitioner devised a scheme involving the alteration of odometers but did not allege that he actually altered the odometers. Petitioner thus could have been convicted of mail fraud, as defined by Section 1341 and as described in the indictment, without any proof that he altered an odometer reading (J.A. 91). By contrast, the court noted that odometer tampering under 15 U.S.C. 1984 requires a showing that a defendant knowingly and willfully altered or caused the alteration of an odometer with intent to change the number of miles indicated

[4] The en banc court agreed with the panel that the evidence was sufficient to support the jury's finding that the 12 mailings were made in furtherance of the fraudulent scheme (J.A. 88)

(*ibid.*). For that reason, the court held that odometer tampering is not a lesser included offense of mail fraud and thus affirmed the district court's refusal to instruct on the offense of odometer tampering.[5]

Judges Flaum and Cudahy dissented on the lesser included offense issue. They concluded that it is unreasonable to determine whether a particular offense is "lesser included" solely by reference to its statutory elements: "Permitting consideration of the indictment and succeeding evidence, *in addition* to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the 'offense charged' in a given case, and of the lesser offenses necessarily subsumed therein" (*id.* at 101) (emphasis in original).

SUMMARY OF ARGUMENT

1. The evidence at trial showed that petitioner used the mails for the purpose of executing his fraudulent scheme, as required by the mail fraud statute. The sale of the vehicles with altered odometers to retail purchasers was an important step in petitioner's scheme. Those sales could be

[5] Because the court read the indictment as not alleging that petitioner had actually tampered with odometers, the court of appeals avoided deciding whether greater and lesser offenses must be compared solely on the basis of their statutory elements, or whether a lesser offense is included within a greater one when the allegations of the indictment state all the elements of the lesser offense, even though the statutory definition of the greater offense does not include all those elements. See J.A. 91, 99. Thus, the court of appeals' narrow holding is that a defendant is not entitled to an instruction on an offense that is not included in either the statutory definition of the charged offense or the allegations of the indictment. We believe, for the reasons stated below (pages 19-30), that the proper test under Rule 31(c) looks to the statutory elements of the two crimes.

accomplished only if the purchasers received a valid title. Thus, petitioner made those sales possible by causing the mailings of 12 title applications on behalf of the retail purchasers. Nothing in the mail fraud statute excludes the 12 mailings from the reach of the statute simply because, in petitioner's words, the mailings may be "routine" or "intrinsically innocent."

Petitioner is wrong, as a matter of fact and law, in asserting that the mailings of title documents were not "for the purpose of executing" his scheme because the documents might have aided investigators in discovering petitioner's fraud. The title documents did not, by themselves, reveal any fraud; rather, the investigation of petitioner's scheme stemmed from complaints by defrauded buyers. In any event, the mail fraud statute does not suggest that a mailing is outside the statute simply because the mailed matter might have the incidental effect of leading to the disclosure and unraveling of the fraud.

The mailings in this case occurred before petitioner's scheme reached fruition. Petitioner's scheme, as charged in the indictment and proved at trial, was to defraud retail customers. Petitioner used dealers as conduits to reach those victims. Petitioner intended dealers to resell the vehicles that he sold to them. Only in that way could petitioner's scheme to defraud the retail customers function on a continuing basis. Accordingly, the mailings of title applications, which allowed the victims to take legal custody of the altered vehicles, were for the purpose of executing petitioner's ongoing fraudulent scheme.

2. Petitioner was not entitled to have the jury instructed that it could find petitioner guilty of odometer tampering rather than mail fraud. An offense is "necessarily included" in another offense within the meaning of Fed. R. Crim. P. 31(c) only if all of the statutory elements of the lesser offense are statutory elements of the

greater offense as well. This "elements" test is supported by the language and history of Rule 31(c). The Rule, which was promulgated in 1944, was intended to adopt the prevailing practice, and the statutory elements test was the governing test in both federal and state courts at that time. This Court's opinions concerning Rule 31(c) have implicitly recognized that the Rule requires a court to compare statutory elements when it considers a request for a lesser included instruction.

In addition to being more faithful to the language, history, and construction of Rule 31(c), the elements test is supported by several strong policy considerations. It is clearer and simpler to apply than the "inherent relationship" test and therefore is far less likely to produce unnecessary litigation in district and appellate courts. It respects the authority of the prosecutor and the grand jury to determine the charges on which a defendant will be indicted and required to stand trial; the "inherent relationship" test, by contrast, authorizes the court to permit a trial and verdict on a charge not brought by the grand jury and not among the lesser included offenses selected by Congress. And the elements test is consistent with the test this Court applies in the double jeopardy area, a closely analogous field, where one offense is deemed to be "necessarily included" within another only if the statutory elements of one are included within the statutory elements of the other.

ARGUMENT

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT PETITIONER USED THE MAILS FOR THE PURPOSE OF EXECUTING HIS FRAUDULENT SCHEME

Petitioner does not argue that the district court erroneously instructed the jury on the crime of mail fraud. Nor does he challenge the jury's findings that he devised a

scheme to defraud and that he caused the 12 mailings charged in this case. Instead, petitioner contends that he was improperly convicted of mail fraud because "the mailings in question were routine mailings, themselves intrinsically innocent or even counterproductive to his scheme" (Br. 21). The "routineness" or "intrinsic innocence" of the mailings, however, is no defense to a charge of mail fraud. What the evidence in this case showed—and what the mail fraud statute requires—is that the mailings were done for the purpose of executing petitioner's fraudulent scheme.

A. The Federal Mail Fraud Statute Applies Even To Routine Mailings That Are Not Intrinsically False Or Misleading

The federal mail fraud statute (18 U.S.C. 1341) renders unlawful any mailing that is made "for the purpose of executing [a fraudulent] scheme." *Kann* v. *United States*, 323 U.S. 88, 94 (1944). As this Court noted in *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element" of the fraud. It is well settled that mailings can be illegal under the statute even if they are "innocent in themselves." *Parr* v. *United States*, 363 U.S. 370, 390 (1960). See, *e.g.*, *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), slip op. 9 (mailings of newspaper that did not contain false statements were for the purpose of executing a fraudulent scheme); *United States* v. *Bernhardt*, 840 F.2d 1441, 1445-1447 (9th Cir. 1988); *United States* v. *Clark*, 649 F.2d 534, 540-542 (7th Cir. 1981).

Similarly, as the courts of appeals have uniformly held, mailings are not beyond the reach of the mail fraud statute simply because, in petitioner's words, they are "routine mailings" (Pet. Br. 21). See, *e.g.*, *United States* v. *Bernhardt*, 840 F.2d at 1446-1447 (mortgage payments); *United States* v. *Green*, 786 F.2d 247, 248-250 (7th Cir. 1986)

(accident reports mailed by police officer); *United States* v. *Mitchell*, 744 F.2d 701, 703-704 (9th Cir. 1984) (mailings by city council relating to condominium conversion); *United States* v. *Primrose*, 718 F.2d 1484, 1490-1491 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984) (affidavit required by state law); *United States* v. *Bright*, 588 F.2d 504, 509-510 (5th Cir.), cert. denied, 440 U.S. 972 (1979) (mailings of notices to creditors by lawyers probating will). Indeed, it is hard to imagine a more "routine" mailing than the mailing of copies of the Wall Street Journal to Journal customers that constituted the unlawful mailings in *Carpenter* v. *United States*, *supra*, or the mailings of confirmation letters to defrauded customers that served as the unlawful mailings in *United States* v. *Sampson*, 371 U.S. 75 (1962). Yet in both cases this Court held that those mailings formed the basis for valid mail fraud charges.

B. The Mailings Of The Title Applications Were Incident To An Essential Step In The Scheme

1. A mailing is for the purpose of executing a fraudulent scheme if it is "a step in [the] plot" (*Badders* v. *United States*, 240 U.S. 391, 394 (1916)) or "incident to an essential part of the scheme" (*Pereira* v. *United States*, 347 U.S. at 8). Accord *Parr* v. *United States*, 363 U.S. at 391. The jury in this case was entitled to find that the mailings of the 12 title applications that were charged in the indictment were "incident to an essential part" of petitioner's scheme, because the mailings occurred in connection with an important step in the fraud.

The indictment alleged that petitioner devised a scheme, which operated from July 1, 1979, through July 10, 1980, to defraud retail purchasers of automobiles in Wisconsin (J.A. 3). As part of that scheme, petitioner sold automobiles with false odometer readings to certain Wisconsin

dealers who in turn—and without knowledge of the false readings—sold the vehicles to the retail purchasers, the victims of the scheme (*id.* at 4-5). In order to make the sales to retail purchasers, the dealers mailed title applications on behalf of their customers to the Wisconsin Department of Transportation (Tr. 33, 59-60, 68-69). The indictment alleged and the evidence proved 12 such mailings between July 25, 1979, and July 2, 1980 (J.A. 89).

The object of petitioner's scheme, as charged in the indictment and proved at trial, was to defraud the retail purchasers of used cars, not the dealers who bought the cars directly from petitioner.[6] The sale of the vehicles to the retail customers was thus a necessary step in petitioner's scheme. In order to complete the fraudulent transaction, petitioner had to ensure that the retail customers would purchase petitioner's cars without realizing that the odometers on those cars had been tampered with. And the evidence was undisputed that the dealers could not complete a retail sale unless they sent a title application to the Wisconsin Department of Transportation.

The dealers were simply the innocent conduits by which petitioner reached the defrauded purchasers in the retail market. Petitioner used the dealers as unwitting assistants in his scheme, and the dealers used the mails to complete the fraudulent sales to the retail purchasers. Because the mailings permitted the retail sales to be completed, the mailings contributed to the success of the scheme. Without

[6] It is plain, as petitioner's counsel acknowledged at trial (Tr. 171), that it was the retail purchasers who suffered from petitioner's scheme, as they testified that they based their purchase decisions in part on the false odometer readings. The dealers did not suffer direct economic harm, because they unwittingly bought and sold the vehicles at an inflated price based on the apparently low mileage on the cars.

the expectation that they could resell the used vehicles, the dealers would not have bought the vehicles from petitioner in the first place and certainly would not have made repeat purchases from petitioner.[7] It is therefore inaccurate to suggest that petitioner's interest in the series of transactions ended as soon as he received payment from the dealers, and before the dealers made the subsequent sales to their retail customers. For that reason, as the courts of appeals have uniformly held in similar cases, a dealer's act of mailing title documents on behalf of a defrauded purchaser furthers the execution of an odometer tampering scheme. See, *e.g, United States* v. *Locklear*, 829 F.2d 1314, 1318-1319 (4th Cir. 1987); *United States* v. *Fallon*, 776 F.2d 727, 729-731 (7th Cir. 1985); *United States* v. *Galloway*, 664 F.2d 161, 163-165 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Shryock*, 537 F.2d 207, 208-209 (5th Cir.), cert. denied, 429 U.S. 1100 (1976). See also *United States* v. *Henson*, No. 87-5132 (6th Cir. June 15, 1988), slip op. 7-10.

2. Petitioner asserts (as he did to the jury) that the mailings were not in furtherance of his scheme, because the title records might have aided investigators in discovering the fraud (Br. 20-23). That contention is without merit, both factually and legally.

As a factual matter, the evidence showed that petitioner's scheme was not discovered as a result of information contained in the dealers' title applications. Although the records of the Wisconsin Department of Transportation were used to obtain the names and addresses of previous owners of the altered vehicles, wit-

[7] Petitioner's scheme was quite extensive; it involved roughly 150 automobiles (Tr. 102), and several of the dealers had repeated dealings with petitioner (Tr. 33, 54).

nesses from the Department testified that petitioner's fraud could not be discovered from examining the title documents (Tr. 125-126). At the time of petitioner's scheme (1979 to 1980), Wisconsin did not require odometer readings to be included on title applications, and the applications did not include a statement from the previous owner about the car's mileage. In fact, petitioner's own witness testified that the investigation in this case stemmed from complaints by defrauded buyers, not from a review of title documents (Tr. 123).

As a legal matter, the case would not stand differently even if the information in the title applications had led directly to petitioner's apprehension. The mail fraud statute does not suggest that a mailing is outside the statute simply because the mailing might aid investigators in uncovering or proving the existence of the scheme. Many documents that are mailed in furtherance of a fraudulent scheme also carry the potential of "leaving tracks" (Pet. Br. 23). See, *e.g.*, *United States* v. *Dowling*, 739 F.2d 1445, 1450-1451 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985); *United States* v. *Gorny*, 732 F.2d 597 (7th Cir. 1984). As the courts of appeals have held, such documents may nevertheless be found to be for the purpose of "executing the scheme" if, as here, they serve the purpose of helping to promote the overall fraudulent plan. See *United States* v. *Serino*, 835 F.2d 924, 929 (1st Cir. 1987).

At bottom, petitioner's argument apparently is that the mailings did not further his scheme because he would have preferred to operate in a world without title-registration laws. Petitioner states (Br. 23) that title registration "is supposed to deter and hinder fraud." Undoubtedly, petitioner is correct that his scheme to defraud retail purchasers would not have been harmed (and may have been

aided) by the absence of a title-registration law. But such a law was in place at the time petitioner devised his scheme, and the success of petitioner's scheme depended on compliance with that law. Therefore, it was reasonable for the jury to conclude that the mailing of the applications helped execute the scheme, even though the information on the applications might ultimately be of use in the fraud investigation.

3. In three cases during the past 50 years, this Court has held that particular mailings did not satisfy the "executing the scheme" requirement of the mail fraud statute. In each of those cases—*Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960); and *United States* v. *Maze*, 414 U.S. 395 (1974)—the Court focused on the scope of the particular fraudulent scheme at issue. The Court concluded that the fraudulent schemes in each of those cases had come to an end before the point at which the mailing occurred, and that the mailing therefore did not serve to execute the scheme.

In the first of those cases, *Kann* v. *United States, supra*, the defendants obtained funds that were diverted from the company for which they worked to a second company in which they had a hidden interest. After the payments were made to the second company, the checks by which the payments were made were sent through the mails for collection to banks in another state. This Court reversed the mail fraud convictions that were based on those mailings, on the ground that the mailings of checks between banks occurred after the defendants' schemes "had reached fruition" (323 U.S. at 94). The Court held that on the facts of that case, the mailings that occurred after the defendants had obtained their money were immaterial to the success of the scheme and thus could not be "for the purpose of executing the scheme" (*ibid.*).

The Court applied the same principle in *Parr* v. *United States, supra*. There, the Court found that the mailings on which the prosecution relied to establish two separate mail fraud schemes were not sufficient to prove a federal offense, because in both cases the mailings occurred outside the scope of the fraudulent scheme. The two charged schemes were the misappropriation of school district tax revenues and the misuse of the school district's oil company credit card for private purposes. In the case of the first scheme, the Court found that the mailing of the tax statements, checks, and receipts was not within the scope of the fraud, because there was no allegation or proof that a part of the defendants' scheme was to increase the amount of the tax levied in order to generate funds to be embezzled. 363 U.S. at 387. In the case of the second scheme, the Court concluded that the mailings between the oil company and the school district were not within the scope of the defendants' scheme because the scheme reached fruition when the defendants obtained the goods and services that they misappropriated; it was immaterial to the defendants, the Court concluded, how (or whether) the oil company received payment for those services. 363 U.S. at 393.

Finally, in *United States* v. *Maze, supra*, the Court reversed a mail fraud conviction where the defendant had used a stolen credit card to obtain services from motel owners. The mailings that formed the basis of the charges were sales slips that were mailed from the motels to the issuing bank, and ultimately to the owner of the credit card, for payment. The Court held that Maze's "scheme reached fruition when he checked out of the motel," and that the mailings among the several victims were immaterial to the success of his scheme (414 U.S. at 402).

In each of those cases, the Court found that the scheme either had ended (or had not begun in the case of one of

the schemes in *Parr*) at the time when the charged mailings occurred. By contrast, this Court has upheld convictions when the mailings occurred while the scheme was still in progress, either because the funds that were the object of the fraud had not yet been obtained (*Pereira* v. *United States, supra*), or because the mailings " 'were designed to lull the victims into a false sense of security [in order to] make the apprehension of the defendants less likely' " (*United States* v. *Lane*, 474 U.S. 438, 451-452 (1986) (citation omitted); see also *United States* v. *Sampson*, 371 U.S. at 81). And in *Sampson* the Court expressly declined to adopt the position that the use of the mails could not be "for the purpose of executing [a] scheme" if the mailings occurred "after the victims' money had been obtained." *Id.* at 80. The Court characterized the *Kann* and *Parr* cases as holding "only that under the facts in those cases the schemes had been fully executed before the mails were used" (*ibid.*).

At the time that the mailings occurred in this case, petitioner had received money from the dealers, but his fraudulent scheme had not "reached fruition" because the sales to the customers were not completed. Unlike the adjusting of accounts among financial institutions that was involved in *Kann, Parr,* and *Maze*, the obtaining of titles in this case was part of the process of transferring the cars to an unsuspecting customer, which was the very means by which petitioner intended to and did profit from his scheme. Unlike the defendant in *Maze*, who was indifferent to whether the motels ever mailed the credit card receipts for payment to the credit card company, the jury here could reasonably find that petitioner benefited from the issuance of the titles. If the titles were not issued, the sales could not be made, and petitioner's continuing business with the dealers would rapidly come to a halt.

By providing the means by which the victims could take legal custody of the cars, the issuance of titles made it possible for the petitioner's scheme to succeed, with the victims none the wiser.

The mailing of the title applications is analogous to the post-payment mailings in both *Sampson* and *Lane*. In *Sampson*, the defendants mailed letters to the victims after receiving payment from them, assuring the victims "that the promised services would be performed" (371 U.S. at 81). And in *Lane*, the defendants caused a proof-of-loss statement to be mailed to the insurer after they had received the proceeds of their fraudulent insurance claim; the Court held that the post-payment mailing in that case was intended to continue the appearance of normalcy regarding the claim, so as to avoid arousing the insurer's suspicions. The same analysis applies here. Obtaining a title for a retail purchaser, which petitioner's "scheme contemplated from the start" (*Sampson*, 371 U.S. at 80), gave the transaction the appearance of legitimacy and thus served to reduce the risk of investigation and discovery.

Although the title application in each case was mailed by a dealer, who was not a party to petitioner's fraud, the same was true in *Lane*, where the mailing was done by an insurance adjuster who was not shown to have been a party to the insurance fraud. And the same result would have obtained in *Sampson* even if the "lulling" acceptance letters had been sent out by a third party, contracting with the defendants, who believed in good faith that the defendants intended to provide the promised services. In each case, it was enough that the mailing was caused by the defendant and was material in some way to the defendants' effort to make the scheme succeed.

Significantly, both *Sampson* and *Lane* emphasized that in analyzing the question whether a particular mailing was

"for the purpose of executing" a fraudulent scheme, it is essential to examine the scope of the scheme alleged in the indictment. See *Lane*, 474 U.S. at 453; *Sampson*, 371 U.S. at 80. In both of those cases, the indictments alleged fraudulent schemes that included fraudulent conduct occurring after the defendants actually received the victims' money, and the evidence at trial supported the scope of the scheme alleged. In this case, as we have noted, the scheme alleged in the indictment and proved at trial was not to defraud the dealers; it was to defraud the retail customers, and that fraud ended only with the customers' obtaining the titles and legal custody of the vehicles. Accordingly, the jury was entitled to find that the mailings of the 12 title applications were "incident to an essential part" of petitioner's fraudulent scheme (*Pereira* v. *United States*, 347 U.S. at 8).

II. PETITIONER WAS NOT ENTITLED TO AN INSTRUCTION ON THE OFFENSE OF ODOMETER TAMPERING

Petitioner next argues that the district court should have instructed the jury that it could find petitioner guilty of odometer tampering (15 U.S.C. 1984, 1990c) instead of mail fraud. He claims that he was entitled to such an instruction under Fed. R. Crim. P. 31(c) because, on the facts of this case, odometer tampering must be regarded as a lesser included offense of mail fraud. Petitioner's contention is wrong. One offense is "necessarily included" in another for purposes of Rule 31(c) only if all of the statutory elements of the lesser offense are elements of the greater offense as well.[8] And in this case, mail fraud and

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[8] Satisfaction of the elements test is a necessary, but not always a sufficient characteristic of a lesser included offense. As the Court has suggested in the double jeopardy context (see *Garrett* v. *United States*,

odometer tampering each have elements that are not common to the other.[9]

1. A jury at common law was allowed to find a defendant "guilty of any lesser offense necessarily included in the offense charged." *Beck* v. *Alabama*, 447 U.S. 625, 633 (1980) (footnote omitted). By 1772, English juries could return a guilty verdict on an offense consisting of some, but not all, of the elements of the crime for which the defendant was brought to trial. See, *e.g.*, *Rex* v. *Withal & Overend*, 168 Eng. Rep. 146, 1 Leach 88 (1772). As this Court noted in *Beck* v. *Alabama*, that practice "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged" (447 U.S. at 633).

In 1872, Congress adopted the common law practice for federal criminal trials when it passed the Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198. That Act provided that "in all criminal causes the defendant may be found

471 U.S. 773 (1985)), an offense is not a lesser included offense under Rule 31(c) if Congress intended to create separate offenses, even though the elements test is satisfied. Thus, in the case of complex criminal statutes such as the federal racketeering (RICO) statute, 18 U.S.C. 1961 *et seq.*, and the continuing criminal enterprise (CCE) statute, 21 U.S.C. 848, which require the proof of multiple predicate crimes as an element of the RICO or CCE violation, the predicate crimes are not considered lesser included offenses of the RICO or CCE violations simply because they appear to satisfy the elements test. It is not necessary for the Court to address cases of that kind here, because in this case there is no dispute that, under the elements test, odometer tampering is not necessarily included in mail fraud.

[9] Indeed, the two offenses have no elements in common. Odometer tampering requires proof that the defendant altered the odometer on an automobile with intent to change the number of miles indicated, while mail fraud requires proof that the defendant, having devised a scheme to defraud, caused a letter to be mailed for the purpose of executing the scheme.

guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment." The federal courts operated under that statute until 1944 when this Court adopted Rule 31(c). That Rule, which has not been amended, states that a "defendant may be found guilty of an offense necessarily included in the offense charged." The Notes of the Advisory Committee observe that Rule 31(c) was intended to be "a restatement of existing law." See *Keeble* v. *United States*, 412 U.S. 205, 208 n.6 (1973). Thus, the meaning of "an offense necessarily included in the offense charged" is derived by reference to the practice prevailing at the time.

In *Stevenson* v. *United States*, 162 U.S. 313 (1896), the Court considered a claim that the jury in a criminal trial for murder should have been instructed that it could find the defendant guilty of manslaughter. After quoting the Act of June 1, 1872, the Court compared the statutory elements of murder and manslaughter. The Court observed that murder is the unlawful killing of a person with malice whereas manslaughter is the "felonious killing of another without any malice" (162 U.S. at 320). Thus, the Court noted that the elements of manslaughter are the same as the elements of murder except for the "absence of * * * malice" (*ibid.*). Because manslaughter was a necessarily included offense of murder and because the issue of malice was fairly disputed by the evidence at trial, the Court held that the jury should have been instructed "to say whether the crime was murder or manslaugter" (*id.* at 323).[10]

[10] This Court, under Rule 31(c), has reaffirmed the practice of instructing a jury on a lesser included offense only if the evidence reasonably justifies a finding of guilt on the lesser offense but not on the greater. See *Berra* v. *United States*, 351 U.S. 131 (1956).

The *Stevenson* approach to necessarily included offenses—*i.e.*, comparing the statutory elements of two crimes—continued until this Court's adoption of Rule 31(c). State courts in the half century preceding the adoption of Rule 31(c) consistently applied the "elements tests" in determining whether one crime was a lesser included offense of another. See *Bolling* v. *State*, 98 Ala. 80, 83, 12 So. 782, 783 (1893) ("in every charge of larceny from a storehouse, there is necessarily [included the charge of] simple larceny"); *People* v. *Kerrick*, 144 Cal. 46, 47, 77 P. 711, 712 (1904) ("To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof."); *State* v. *Marshall*, 206 Iowa 373, 375, 220 N.W. 106, 106 (1928) ("if certain elements are necessary to a criminal charge, and these elements plus certain other elements, make the necessary elements of a higher crime, then the lower crime is included in the higher one"); *State* v. *Henry*, 98 Me. 561, 564, 57 A. 891, 892 (1904) ("a practically universal rule prevails, that the verdict may be for a lesser crime which is included in a greater charged in the indictment, the test being that the evidence required to establish the greater would prove the lesser offense as a necessary element"); *People* v. *Martin*, 293 N.Y. 361, 364, 57 N.E.2d 53, 55 (1944) ("The crime of grand larceny is not necessarily included, for some essential elements of that crime are not essential elements in the crime charged").

In *Giles* v. *United States*, 144 F.2d 860 (9th Cir. 1944), which was decided only three months before the adoption of Rule 31(c), the court explained "the character of a lesser offense on which an instruction is warranted" (144 F.2d at 861). The court stated: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the

lesser" (*ibid.* (citation omitted)). Applying this test, the court held that the crime of "pointing firearms" at a person is not included in the crime of negligent homicide. The court compared the two crimes and noted that the " '[p]ointing firearms' " statute has the element of "intentional 'pointing'," which is not an element of negligent homicide (*ibid.*) (citation omitted)).

In sum, the test for determining whether a crime is necessarily included in another crime so that the jury may convict on the lesser crime was well settled in 1944: a crime is necessarily included in a greater crime only if all of its statutory elements are also elements of the greater offense. Rule 31(c) adopted that "practically universal rule" (*State* v. *Henry*, 98 Me. at 564, 57 A. at 892) at the time it was adopted with the express purpose of codifying pre-existing law.

The federal courts faithfully applied the elements test for years following the adoption of Rule 31(c). See, *e.g.*, *Kelly* v. *United States*, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 913 (1967); *Larson* v. *United States*, 296 F.2d 80, 81 (10th Cir. 1961); *United States* v. *Barbeau*, 92 F. Supp. 196, 200 (D. Alaska 1950), aff'd, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968 (1952). Although this Court has not construed the term "necessarily included" since it promulgated Rule 31(c), the Court's opinions in cases involving that Rule have focused on the statutory elements of the crimes. For example, in *Berra* v. *United States*, 351 U.S. 131 (1956), the Court stated: "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense" (*id.* at 134). The Court applied that principle in *Sansone* v. *United States*, 380 U.S. 343 (1965), when it reviewed a claim by a defendant charged with evading income taxes that the jury should have been

allowed to find him guilty of failing to pay a tax when due. The Court compared the statutory elements of the two crimes (*id.* at 351) and concluded that the crime of failing to pay a tax when due is a "lesser-included offense," because the crime of tax evasion simply requires the additional element of "an affirmative act constituting an evasion" (*ibid.*). Hence, the implicit understanding of the Court in *Berra* and *Sansone* was that Rule 31(c) requires a court to compare statutory elements when it considers a request for a lesser included offense instruction.

In 1971, the District of Columbia Circuit departed from its prior precedent (*e.g., Kelly* v. *United States, supra*) and abandoned the elements test. In *United States* v. *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), the court adopted an approach under Rule 31(c) that looks to the evidence presented at trial. Under the *Whitaker* analysis, which petitioner advocates (Br. 32), a defendant is entitled to a lesser included offense instruction if the evidence shows that he may have committed a crime different from the one charged, as long as the uncharged crime and the crime charged in the indictment have some " 'inherent' relationship" (447 F.2d at 319) (footnote omitted). The courts that have followed *Whitaker* have defined the " 'inherent' relationship" to mean that the two offenses "must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319; *United States* v. *Stolarz*, 550 F.2d 488, 491 (9th Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Pino*, 606 F.2d 908, 916 (10th Cir. 1979).

2. The "inherent relationship" test should not be adopted by this Court for a variety of reasons. First, the inherent relationship test departs from the original and well settled meaning of Rule 31(c). As we have noted, the

"elements" test was the prevailing view at the time Rule 31(c) was adopted, and the Rule was designed to codify the current practice. Moreover, the language of the Rule, although not conclusive, supports the "elements" test. In particular, the term "necessarily included" strongly suggests that it is the elements of the two crimes that must be consulted, not the evidence that may develop at a particular trial.

The structure of the Rule is also inconsistent with the "inherent relationship" test. The Rule by its terms does not create a right of the defendant or the government. It simply provides that the defendant "may be found guilty of" a lesser included offense. That language suggests that if a particular offense is a lesser included offense, the jury can be instructed on that offense, whether the instruction is requested by the prosecution or the defense. Yet as petitioner concedes (Br. 31), adoption of the "inherent relationship" test would require the abandonment of mutuality under the Rule: although the defendant could request a lesser included offense charge on an offense established by the evidence, constitutional problems of notice and the right to an indictment by a grand jury could deny the government the right to request an instruction on the same offense. See *Stirone* v. *United States*, 361 U.S. 212 (1960). Thus, although Rule 31(c) appears to contemplate that either party may seek a lesser included offense instruction, the adoption of the "inherent relationship" test would prevent the Rule from being applied in that manner.

Second, the traditional statutory elements test has the virtue of being clearer and simpler to apply than the inherent relationship test favored by petitioner. Because it requires that the statutes be compared in the abstract and does not involve the inferences that might reasonably be drawn from the evidence at trial, the elements test makes it possible to predict before trial the offenses on which the

jury will be instructed, enabling both sides to plan their strategies. And because it does not turn on easily contestable factors such as what the evidence at trial showed and whether two offenses are "inherently related" in light of the proof at trial, the elements test should also minimize litigation, both before the district court and on appeal, over whether a lesser included offense instruction should have been given in a particular case.

This case presents a good example of the confusion that the "inherent relationship" test can create. Although the three-judge panel on appeal was applying the "inherent relationship" test, the dissenting judge on the panel concluded that the odometer fraud and mail fraud statutes were not sufficiently related on the facts of this case to require that the jury be instructed on odometer fraud as a lesser included offense. In light of the amorphous nature of the inquiry into whether the two offenses serve sufficiently similar purposes to be deemed "related," it is hardly surprising that courts would find the concept of "inherent relationship" difficult to apply.

Third, because it permits the jury to consider only the crime listed in the indictment (or one containing all the same elements as the charged crime), the statutory elements test accords with this Court's recognition that the responsibility for selecting the statute under which the accused will be prosecuted falls to the prosecutor and the grand jury. As this Court has stated repeatedly, "[t]he Government * * * is responsible for initiating a criminal prosecution, and subject to applicable constitutional limitations it is entitled to choose those offenses for which it wishes to indict." *Garrett* v. *United States,* 471 U.S. 773, 790 n.2 (1985). Accord *Ball* v. *United States,* 470 U.S. 856, 859 (1985); *United States* v. *Batchelder,* 442 U.S. 114 (1979). If the grand jury wishes to charge the defendant with two closely related offenses, it is free to do so. But when a court decides, at the end of the case, to instruct the jury on a crime *not* charged in the indictment, simply

because that crime is closely related to the crime that *was* charged, the court is preempting the grand jury's role in determining the scope of the indictment. Under the inherent relationship test, the court is given the authority to decide whether some other uncharged offense would appear to fit the evidence in the case as the jury might view it. As a result, the defendant may end up being subject to trial and conviction on a charge that the grand jury did not contemplate, or even one on which it expressly declined to indict.

Fourth, the statutory elements test is consistent with this Court's teachings in the closely related context of double jeopardy law. Under the Double Jeopardy Clause, the Court has held that an offense is included in a greater offense only if it is "invariably true [that] the lesser offense * * * requires no proof beyond that which is required for conviction of the greater." *Brown* v. *Ohio,* 432 U.S. 161, 168 (1977). As the Court noted in *Brown,* "[t]his test emphasizes the elements of the two crimes" (*id.* at 166). And the Court has compared statutory elements—*i.e.*, "whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States,* 284 U.S. 299, 304 (1932))—as a guide in determining whether Congress intended the violation of two statutes to be punished cumulatively. See *Albernaz* v. *United States,* 450 U.S. 333, 337 (1981).

The determination whether two crimes constitute separate offenses for double jeopardy purposes is closely related to the determination whether two crimes constitute separate offenses for purposes of the lesser included offense inquiry. That point is perhaps best made by this Court's decision in *United States* v. *Woodward,* 469 U.S.

105 (1985). In that case, the court of appeals refused to permit separate judgments and cumulative sentences to be imposed for violations of the federal false statement statute, 18 U.S.C. 1001, and the statute that made it a crime for a person to fail to report that he was carrying more than $5,000 into the country, 31 U.S.C. (1976 ed.) 1058, 1101. This Court reversed and permitted the separate judgments and sentences to stand. The Court explained that the court of appeals had incorrectly concluded that the false statement felony was a lesser included offense of the currency reporting misdemeanor.

Although the Court in *Woodward* was focusing on the issue of separate punishment, the Court's analysis is instructive. Using precisely the same term that is found in Rule 31(c), the Court held that under a proper application of the statutory elements test, the currency reporting violation does not "necessarily include" proof of a false statement offense (469 U.S. at 108). For that reason, the Court held, the court of appeals was wrong in finding that the false statement felony was a lesser included offense of the currency reporting misdemeanor. If the statutory elements test is the proper one for finding lesser included offenses in the sentencing context, there is no reason to suppose that the test should be any different in the context of jury instructions.

Finally, contrary to petitioner's assertion, there is no unfairness in refusing to give a lesser included offense instruction in a case such as this one. A jury instruction on a lesser included offense does not, in the abstract, favor either the government or the defendant; instead, it "has its dangers—to both sides." *United States* v. *Tsanas*, 572 F.2d 340, 345 (2d Cir.), cert. denied, 435 U.S. 995 (1978). While the absence of a lesser included offense as an alternative for the jury may induce the jury to convict on the greater

charge, particularly in cases involving violence or otherwise having strong emotional overtones, see *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980); *Keeble* v. *United States*, 412 U.S. 205, 213 (1973), it may also lead to an outright acquittal where the jury is unable to find all the elements of the greater offense present, but would have convicted the defendant of a less demanding offense. Indeed, the double-edged character of the issue is underscored in this case by the irony that if petitioner wins on his challenge to the sufficiency of the evidence of mail fraud, he will no doubt be gratified that the jury was not given a lesser included offense instruction on odometer tampering, to which he admitted at trial he had no defense. It is therefore by no means clear that, as a general matter, the "inherent relationship" test is more favorable to defendants than the "elements" test; *a fortiori*, it is unclear that the inherent relationship test is any "fairer" than the traditional approach.

In assessing the relative merits of the two competing tests, it is important to keep in mind that the choice is not between a system containing lesser included offenses and one containing no lesser included offenses at all. The elements test preserves intact traditional lesser included offenses, such as the lesser degrees of homicide (see 18 U.S.C. (& Supp. IV) 1111, 1112) and the lesser degrees of armed bank robbery (see 18 U.S.C. (& Supp. IV) 2113). In those instances, where the legislature has intentionally created a set of lesser included offenses, it may be that the enhancement of the accuracy of jury verdicts outweighs the risks of jury confusion and compromise. But where the defendant seeks a lesser included offense instruction on a statute that was not charged in the indictment and may have altogether different elements from the charged offense, the possibility of "enhanced accuracy" in the verdict is outweighed not only by the possibility of jury con-

fusion, but also by the interest in having a verdict on the charge selected by the grand jury as the appropriate vehicle for the defendant's prosecution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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